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NO. 86-

in the Supreme Court of the United States

October Term, 1986

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JOSEPH F. SPANIOL, JR.
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HUGHLAN LONG, S. DEWEY HAAS and CARL RASSLER, individually and on behalf of all retired and present male employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, as well as the surviving joint annuitants of any deceased retired male employees,

Petitioners,

vs.

THE STATE OF FLORIDA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the opinion below directly conflicts with *City of Los Angeles, Department of Water and Power v. Manhart,* 435 U.S. 702 (1978) ("*Manhart*"); *Bazemore v. Friday,* ____ U.S. ____, 106 S.Ct. 3000 (1986) ("*Bazemore*"); *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977) ("*International Teamsters*") and/or the requirements of the Equal Pay Act of 1963, 29 U.S.C. §206 ("Equal Pay Act") in awarding relief based on the "unisex" rate for males and the "female" rate for females where that rate fails to equalize the benefits received by class members and identically situated female retirees, and/or fails to treat pension benefits as "wages" under the Equal Pay Act.

2. Whether the opinion below directly conflicts with *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975) ("*Albemarle*") in failing to specifically hold as a matter of law that this employer was guilty of "bad faith" conduct which precluded it from asserting any equitable defenses to full relief for Plaintiffs.

3. Whether the opinion below directly conflicts with *Manhart* and *Bazemore* in denying damages for discriminatory benefits paid after *Manhart* to class members who retired prior to *Manhart.*

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STATUTES INVOLVED

This case involves §§703 and 706 of Title VII of the Civil Rights Act of 1964 as amended [78 Stat. 255 & 86 Stat. 109; 78 Stat. 259 & 86 Stat. 104]—42 U.S.C. §2000e-2(a)(1) and 42 U.S.C. §§2000e-5(g).

42 U.S.C. §2000e-2 provides in relevant part:

> (a) Employer practices. It shall be an unlawful employment practice for an employer—
>
> > (1) [t]o discriminate against any individual with respect to his compensation. . . or privileges of employment, because of such individual's. . . sex. . . . .

42 U.S.C. §2000e-5(g) provides in relevant part:

> Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders. If the court finds that the respondent has intentionally engaged in or is engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, . . . back pay. . . , or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

This case also involves the Equal Pay Act of 1963, 29 U.S.C. §206(d)(1) which provides:

Prohibition of sex discrimination

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The decision of the Eleventh Circuit (A. 1-23) is reported at 805 F.2d 1542. The judgment of the district court (A. 32-33), that judgment's underlying order (A. 34-35), and the two orders of March 31, 1986, and March 16, 1984, incorporated therein (respectively, A. 36-69 and A. 70-82) are not reported. All are reprinted in the Appendix hereto at the pages indicated.

JURISDICTION

Plaintiffs initially sought relief having a present value of $200 million under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e *et seq.*), 42 U.S.C. §1983 and pendent state law claims. Plaintiffs invoked the district court's jurisdiction pursuant to 28 U.S.C. §1343 and its pendent jurisdiction over state claims. The district court dismissed Plaintiffs' §1983 and pendent state law claims (A. 73-74). Thereafter this case proceeded solely on Plaintiffs' Title VII claims.

Following the district court's $43,600,000.00 judgment (A. 32-33), defendants invoked the Eleventh Circuit's jurisdiction under 28 U.S.C. §1291, and Plaintiffs subsequently cross-appealed. The Eleventh Circuit granted a stay, consolidated the two appeals, and expedited the case. (A. 31).

On December 19, 1986, the Eleventh Circuit rendered its decision (A. 1-24) and Plaintiffs' petition for rehearing was denied on February 19, 1987 (A. 24-25).[1] The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1]The Eleventh Circuit's denial of rehearing is reported at 805 F.2d at 1552.

PARTIES TO THE PROCEEDING

The Plaintiff class is comprised of two sub-classes. Subclass 'A' consists of retired male employees of the State of Florida, its agencies and political subdivisions who retired after March 24, 1972 and before August 1, 1983, and who elected to receive their benefits under options providing joint and/or survivor benefits to the retired employee and another person designated as a joint annuitant or beneficiary. (A. 37). Subclass 'A' also includes the surviving joint annuitant or beneficiary of a deceased male retiree who would otherwise be a class member. (A. 37). Subclass 'B' consists of males presently employed by the State of Florida, its agencies and political subdivisions and who are vested in the Florida Retirement System (FRS). (A. 37). Only the claims for Subclass 'A' are involved in this appeal.

The employer/Defendants are the State of Florida, its agencies and political subdivisions, and various appropriate officials of state government. (A. 37). The State of Florida is an employer for purposes of Title VII. (A. 38).

STATEMENT OF THE CASE

The facts described herein are either undisputed or taken from the extensive findings of fact and conclusions of law made by the learned trial judge and affirmed by the Eleventh Circuit Court of Appeals. The Plaintiff class accepts *all* the court's factual determinations. The jurisdictional conflict here urged pertains to certain conclusions of law reached upon those facts.

This is a class action suit seeking relief having a present value of approximately $200 million[2] (A. 46), brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5 for sex discrimination in the employer's administration of an employee retirement plan. Specifically, Plaintiffs claimed that the employer's use of sex based mortality tables (i.e. separate mortality tables for males and females) which provided greater monthly retirement benefits to females (and their joint annuitants or beneficiaries) than to otherwise identically situated males (and their joint annuitants or beneficiaries) constituted unlawful sex discrimination. (A. 36).[3]

At trial, Plaintiff class established that the employer's use of the sex distinct mortality tables, resulting in smaller monthly benefit payments to men than to women, was a violation of Title VII. (A. 60-61). The district court further found that this was an

[2]Curiously, the $216 million "excess cash" appropriated in 1984 by the legislature to create monies to pay any "unexpected increases" in pension debts (A. 21, 97), is almost equal to the $200 million sought by Plaintiff's claim (of which $43.6 million has been awarded; the additional $157 million is sought by this Petition for Certiorari). The employer vigorously contends that this is mere coincidence.

[3]As has been true of all Title VII pension cases on sex discrimination, the greater life expectancy assumed for the female causes the discriminatory result. In *Long*, the male retiree and his female joint annuitant suffer due to the assumed greater life expectancy of the female joint annuitant. The employer has stipulated to the existence of this result. (A. 44).

employer-administered plan involving no "open market" issue and, thus, was controlled by this Court's 1978 decision in *City of Los Angeles, Department of Water & Power v. Manhart,* 435 U.S. 702 (1978) (*"Manhart"*) and not its 1983 decision in *Arizona Governing Committee For Tax Deferred Annuity And Deferred Compensation Plans v. Norris,* 463 U.S. 1073 (1983) upon which the employer relied as its alleged first warning and the catalyst of the alleged "emergency" elimination of the sex distinct rates for new retirees as of August 1, 1983. (A. 38, 61-62).

Since 1975, the plan has been funded by contributions paid by the employer and from investment returns on fund assets. (A. 42-43). The contribution rate is set by the legislature as a percentage of payroll and is changed from time to time as it wishes. (A. 54).

Prior to August 1, 1983, the FRS utilized separate "male" and "female" rates (mortality tables) to calculate retirement benefits under options 2, 3 and 4. (A. 9). Thus, while equal contributions were made for male and female employees, because of the use of these tables, a male retiree who selected an option which also protected his spouse during her life received a smaller monthly retirement payment than an otherwise identically situated female retiree who had chosen the same protection for her spouse. (A. 8-9, 42, 44). Subsequent to the commencement of this action (July 2, 1982), the FRS discontinued use of these sex distinct rates on August 1, 1983 for persons retiring after that date and, in their place, adopted "unisex" rates. (A. 9, 41-42). These "unisex" rates were derived by taking a weighted average of the male and female tables proportionate to

the number of male and female FRS members.[4] The result was a middle level of benefits, lower than those previously available at the "female" rate and greater than those previously available at the "male" rate; however, this rate was paid to employees only if they retired after August 1, 1983. (A. 9, 41-42). The 1983 conversion resulted in no additional cost to the FRS, since it merely involved a reallocation between men and women of existing benefit obligations. (A. 59).

However, for persons who retired *prior* to August 1, 1983, the employer continued to pay discriminatory benefits based upon the sex distinct rates and will continue to do so even under the remedy affirmed below unless this Court acts to correct the situation. Under the judgment affirmed by the Eleventh Circuit below, Plaintiff class members would receive monthly benefits increased from the "male" rate to the "unisex" rate, but the otherwise identically situated females continue to enjoy the higher "female" rate.

Even more than a year before this Court's decision in *Manhart* became known, this employer was aware of early E.E.O.C. rulings regarding the use of sex-based mortality tables. The FRS administrators, especially the State Retirement Actuary, questioned the legality of Florida's pension system and warned each other about

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[4]Literally and technically among actuaries, "unisex" only means the use of one rate for both sexes. Usually, "unisex" refers to a weighted average of the "male" and "female" rates of life expectancies. The one rate is applied to determine life expectancy for both sexes. (A. 8).

its implications. The record shows that this employer and its pension fund *consciously declined* to revise the FRS' sex distinct actuarial tables as early as 1976. By memorandum dated November 16, 1976, State Retirement Actuary Lawrence Gibney urged the then State Retirement Director, Robert L. Kennedy, Jr., (predecessor to the Defendant, Andrew J. McMullian, III) to *abandon* the sex-biased actuarial tables before 1977. (A. 101-108). The State Retirement Actuary *warned* that the Equal Employment Opportunity Commission would no longer permit sex-biased mortality standards. He further stated:

> I would not bring this to your attention if it were not for the *pressure of the Federal government via the EEOC to have equal benefits without regard to sex. Since our option factors make this distinction, it would seem prudent to resolve our course of action before the 1977 valuation is started.*
>
> * * *
>
> [*I*] *would recommend we consider* going to the new basis for option reduction factors *and resolve this differential in the benefits between the sexes once and for all.* (Emphasis added). (A. 107).

Obviously, this particular employer-operated pension fund had a current grasp of legal events in 1976, even prior to *Manhart.*

Some one and one-half years later, in April, 1978, this Court decided *Manhart.* On May 19, 1978, the State Retirement Actuary wrote another memorandum to the

pension fund director regarding the development of "unisex" factors and, referring to the *Manhart* decision, he warned:

> In light of the recent Supreme Court decision, *it is not a question of 'if' but 'when' we adopt such factors.* (Emphasis added). (A. 56-57, 109-110).

Three years went by with the illegal tables still in use. Then, the State Retirement Actuary issued another warning dated May 21, 1981, to the State Retirement Director, Andrew J. McMullian, III again recommending a change to a "unisex" table. (A. 115-116). It was specifically suggested by the State Retirement Actuary that *early* implementation be done *"to avoid any possible retroactive liability that may arise."* (A. 116). He further cautioned:

> If we were forced by a court order to a 'unisex' table, *it's conceivable we would have to make adjustments back to* [*the*] *date of the Manhart case which occurred in September* [sic] [April] *1978.* We would have to increase the male benefits but I have my doubts as to whether we would be successful decreasing the female benefits. Hence, *there could be a retroactive liability.* (Emphasis Added). (A. 116).

Still, the employer and its pension fund did nothing to implement a change to a non-discriminatory system. (A. 58).

State Retirement Director McMullian also acknowledged the risk that retroactive damages could be imposed back to the date of *Manhart* if "unisex" tables were not adopted. In his June 25, 1981 letter to

an administrator of another state's pension plan, the Director admitted that conversion to "unisex" rates was an "issue [that] is not going away. . ." (A. 121). This letter by the Director also admits that if the employer "were *forced* to make *retroactive adjustments,* the cost would be at least 3 times the amounts cited above, *based on the number of years elapsed since April 1978.*" (Emphasis added). (A. 123). Obviously, the reference to April 1978 was to the *Manhart* decision.

As of July 10, 1981, this employer was actively speculating about the risks of retroactive liability which might arise from a lawsuit exactly like this one. Division of Retirement Staff Attorney, Diane K. Kiesling, wrote a memorandum on that date to Mr. McMullian, wherein it was stated:

> The reasons for the Supreme Court's denial of retroactive relief in *Manhart* no longer exist and I suspect that retroactivity is going to start showing up in these types of cases in the future. . . .
>
> * * *
>
> There is no necessity for legislative action prior to adoption of so-called unisex tables. This change can be achieved solely by amendment of the FRS rules. (A. 126).

Still, the FRS took no action to abolish its sex-distinct mortality tables.

On September 1, 1981, David V. Kerns, General Counsel to the Department of Administration, received a memorandum from attorney Samantha Boge, a

member of his legal staff. In that memorandum it was stated, *inter alia*:

> *Using sex-distinct actuarial tables* resulting in higher monthly benefits for female retirees and their families than male retirees *violates Title VII in my opinion*, as surely as unequal monthly employee contributions. *While such use may be permissible by insurers generally, it is not permissible by employers like the State of Florida.* (Emphasis added). (A. 128).

Still, nothing changed. The employer's agents denied at trial that these written memoranda really meant what they said, and the employer contended that it had reasonably relied upon some oral legal advice from David V. Kerns which suggested that *Manhart* might not necessarily apply to the FRS. The district court rejected the reasonableness of this alleged reliance on Mr. Kerns stating:

> After hearing the evidence in this case, there is no longer doubt at all that the state was on notice *at least from the date of Manhart* that the use of sex-based mortality tables was impermissible. The court will emphasize its finding of March 16, 1984, by saying that *the state could not and did not reasonably assume that it could continue to use the sex-based tables.* (Emphasis added). (A. 61).

The district court also found that the employer's pension plan "refused" to make the change they knew to be required by *Manhart* because they "simply did not want to make the politically unpopular decision to reduce the females' benefits." (A. 61).

Class Plaintiff representatives, HUGHLAN LONG and CARL RASSLER, as well as class member N. LOUIS SAMAHA wrote FRS plan administrators threatening litigation if this situation was not corrected. Then they filed formal charges with the E.E.O.C. Through all of this, this employer did nothing to correct the plan. The other specific findings by the trial judge as to the conduct of this employer are several and rather pointed:

> Why the defendants thought the Supreme Court would change its mind after *Manhart* has never been explained; perhaps the defendants wanted a direct order from the United States Supreme Court to the FRS to change its policies. And yet, defendants never requested an opinion from the Attorney General of Florida nor even a declaratory judgment from this court or a state court. It is clear that the defendants refused to act on the misplaced assumption that there would be no retroactive damage award. *Manhart* states, almost naively, that 'there is no reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices to conform to this decision.' *Id.* at 720, 721. Unfortunately, in Florida that prophecy has proved incorrect. (A. 64).

As previously noted, it was not until August 1, 1983, about one year after the instant suit was commenced, that the Florida Retirement System, on an alleged "emergency" basis, finally adopted "unisex" tables as to new retirees. According to FRS policy, the "unisex" tables applied *only* to those persons retiring on or after

August 1, 1983, and this employer continued to pay discriminatory retirement benefits to all members of the Plaintiff class.

The Eleventh Circuit below affirmed all findings and conclusions by the trial judge.

The district court and the Eleventh Circuit, however, rejected the Plaintiffs' argument that this employer was not entitled to raise equitable defenses[5] because it had acted in "bad faith", defined in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975) ("*Albemarle*") as "maintaining a practice which [the employer] knew to be illegal or of highly questionable legality." Upon the facts stated above the district court concluded and the Eleventh Circuit agreed that Defendants' decision not to conform to *Manhart* was merely "poor judgment" but not bad faith. (A. 24-25, 63). Plaintiff class contends that this conclusion below is clearly erroneous.

In determining the method by which to calculate the award, the Court below held that an increase only to a "unisex" level was warranted for males even while the higher "female" rate would still be used for the females. Unless corrected pursuant to this Petition for Certiorari, this will result in male retirees still receiving a smaller monthly retirement benefit than females.

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[5]Such as not granting retroactive relief to pre-*Manhart* retirees for the discriminatory monthly payments received in the years *after* the *Manhart* ruling, and not equalizing pension rates between men and women due to the vested rights of the women.

Thus, the court below granted the following relief. As to all class members, the employer was directed to adjust all of the males upward to "unisex" rates from the date of the judgment forward. The present value of this portion of the award is approximately $32,265,000.00. (A. 68-69).

The court also awarded retroactive damages for the past underpayment of retirement benefits (an increase from the "male" rate to the "unisex" rate) from October 1, 1978 (*Manhart*) to the date of judgment, but only as to class members who retired after October 1, 1978. The amount of this award is approximately $12,800,000.00. (A. 69). The October 1, 1978 date was chosen by the district court because it concluded that this employer would have been reasonably entitled to five months within which to implement the April, 1978 *Manhart* decision. (A. 65). However, no retroactive relief for underpayments during this period were awarded to class members who retired prior to October 1, 1978. (A. 68-69). Approximately 5,000 of the 12,000 class members were thus denied retroactive relief.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW DIRECTLY CONFLICTS WITH *MANHART, BAZEMORE, INTERNATIONAL TEAMSTERS* AND/OR THE EQUAL PAY ACT IN AWARDING RELIEF BASED ON THE "UNISEX" RATE FOR MALES AND THE "FEMALE" RATE FOR FEMALES WHERE THAT RATE FAILS TO EQUALIZE THE BENEFITS RECEIVED BY CLASS MEMBERS AND IDENTICALLY SITUATED FEMALE RETIREES AND/OR FAILS TO TREAT PENSION BENEFITS AS "WAGES" UNDER THE EQUAL PAY ACT

The Eleventh Circuit affirmed the district court's decision to limit the award to the class to the "unisex" rate rather than to the "female" rate even though under this approach class members will continue to receive smaller monthly retirement checks than otherwise identically situated female retirees. In upholding this measure of damages, the circuit court stated, "Title VII does not require equalization; it only requires that plaintiffs be made whole," (A. 23); *i.e.* in the position that they would have occupied if the FRS had timely converted to unisex factors. Plaintiffs respectfully submit that the circuit court's interpretation of the "make whole" standard is fundamentally wrong because it perpetuates rather than eliminates the illegal discriminatory practices. As such, the decision below conflicts with several decisions of this Court which mandate absolute equality of benefits under these circumstances.

The award of relief at "unisex" rather than "female" rates is improper under general principles of Title VII, and further conflicts with decisions of this Court. Equality of economic relief is a simple mechanical function of applying an individual class member's age, average salary, years of service, etc. to the same female annuity tables used for his otherwise identically situated counterpart. Under the facts of this case, the remedy adopted does not provide economic equality and that is the purpose of Title VII; to the contrary, the use of the "unisex" rate for males, but a "female" rate for females, perpetuates the illegal discrimination. The decision below thus also conflicts with this Court's recent decision in *Bazemore v. Friday*, ___U.S.____, 106 S.Ct. 3000 (1986) (*"Bazemore"*) which held that Title VII required *equal* pay checks for similarly situated black and white employees. In *Bazemore* this Court characterized as "too obvious to warrant extended discussion" the principle that Title VII requires the elimination--not the perpetuation of discrimination. Title VII thus *does* require *absolute equality* in employment benefits between similarly situated persons of different race, sex, creed, religion or national origin.

The opinion below purports to rely expressly on *Manhart* for support, but this reliance is misplaced. Nothing in *Manhart* says or infers that the remedy for its facts (a "unisex" rate) would necessarily become the sole remedy for every other pension case or that a "unisex" rate could be used to create inequality instead of equality. Moreover, *Manhart* would prohibit the use of any remedy which sanctions and continues the same form of economic discrimination which provoked the "successful" litigation by the Plaintiffs in the first instance.

In the opinion below, confusion seems to have arisen between the mechanism, a sex-distinct mortality table, and the illegal result, discrimination in the pension check between comparable men and women retirees. The opinion below affirmed the elimination of the original *mechanism* ("male" rates and "female" rates), but replaced it with another discriminatory mechanism ("unisex" rates and "female" rates). If this new mechanism involved a single "unisex" rate and applied to *everyone* equally, no error would be involved here. But, this new mechanism, according to the opinion below, must continue to pay its female retirees at the "female" rate without doing the same for the males. This provides the employer with a "windfall" savings and has left an illegal result largely intact despite a clear ability of the employer to pay.[6]

Furthermore, that "equal pay for equal work" is a basic precept of Title VII cannot be questioned. This Court has often observed that Congress enacted Title VII to ensure "equality of employment opportunities." *E.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 348 (1977) (*"International Teamsters"*). In recognition of this principle the circuit courts have long held that the provisions of the Equal Pay Act, 29 U.S.C. §206, set the measure of damages in a Title VII sex discrimination case. In *Crabtree v. Baptist Hospital of Gadsden, Inc.*, 749 F.2d 1501, 1503

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[6]The court below affirmed that this pension fund has about $216 million in "excess cash" over and above the cash required to pay all future obligations and maintain the FRS on an actuarially sound basis. (A. 21). The award has a present value of about $43.6 million, the other relief has a present value of approximately $157 million. (A. 32-33). The total assets of the fund exceed $9 billion. (A. 38-39).

(11th Cir. 1985) the Court stated, "[t]he sex discrimination provisions of Title VII must be read in harmony with the Equal Pay Act. . . . Basing a backpay award under Title VII on a salary found to violate the Equal Pay Act would ignore both Title VII's purpose of making victims whole for economic losses suffered through past discrimination and the requirement that Title VII and the Equal Pay Act be read in harmony." Similarly, in *Orahood v. Board of Trustees of the University of Arkansas*, 645 F.2d 651, 654 n. 6 (8th Cir. 1981), the Court stated, "Under a pure claim of unequal pay for equal work, the standards of the Equal Pay Act apply whether the suit *alleges a violation of that Act or Title VII. See Gunther v. County of Washington*, 623 F.2d 1303, 1321 (9th Cir. 1979), *cert. granted*, ____ U.S. ____, 101 S.Ct. 1343, 67 L.Ed.2d 330 (1980). Where the claim is one involving inadequate compensation, but a comparison with equal work is not possible, Title VII may still provide relief." (Emphasis added). There can be no serious question that pension benefits are as much a part of compensation as salary and therefore constitute part of an employees "wages" within the meaning of the Equal Pay Act. *E.g. Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1081 (D.C. Cir. 1984); *Sylvania Electric Products, Inc. v. NLRB*, 291 F.2d 128 (1st Cir. 1961).

The Equal Pay Act flatly forbids relief which simply lowers the advantaged party to the level of the disadvantaged party and thereby creates "equality." As this Court stated in *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) (*"Corning Glass"*):

[C]ongress required that employers pay equal pay for equal work and then specified:

> '*Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.' 29 U.S.C. §206(d)(1).'
>
> The purpose of this provision was to ensure that to remedy violations of the Act, '[*t*]*he lower wage rate must be increased to the level of the higher.*' H.R.Rep.No.309, *supra*, at 3, U.S. Code Cong. & Admin. News, 1963, p.688. Comments of individual legislators are all consistent with this view. Representative Dwyer remarked, for example, 'The objective of equal pay legislation . . . *is not to drag down men workers to the wage levels of women, but to raise women to the levels enjoyed by men in cases where discrimination is still practiced.*' Representative Griffin also thought it clear that '[*t*]*he only way a violation could be remedied under the bill . . . is for the lower wages to be raised to the higher.*' (Emphasis added) 94 S.Ct. at 2234.

The relief awarded by the district court and affirmed by the circuit court in this case plainly conflicts with the Equal Pay Act and this Court's decision in *Corning Glass*, as these principles are to be applied in a Title VII case. By awarding relief at the lower "unisex" rate

rather than the higher rate paid to identically situated females the Plaintiff class is still denied "equal pay for equal work." As noted in *Corning Glass*, the Equal Pay Act unequivocally requires that the lower benefits received by males be raised to the same level as benefits received by females. Relief which merely raised males' benefits to some middle level which is still less than females' benefits is insufficient and improper as a matter of law. The courts below simply failed to raise the disadvantaged Plaintiff class to the higher benefit level received by the advantaged female retirees as required by Title VII, the Equal Pay Act and *Corning Glass*. Thus, the decision below also directly conflicts with *Corning Glass*.

II. THE OPINION BELOW DIRECTLY CONFLICTS WITH *ALBEMARLE* IN FAILING TO SPECIFICALLY HOLD AS A MATTER OF LAW THAT THIS EMPLOYER WAS GUILTY OF BAD FAITH CONDUCT WHICH PRECLUDED IT FROM ASSERTING ANY EQUITABLE DEFENSES TO FULL RELIEF FOR PLAINTIFFS

Plaintiffs argued unsuccessfully that this employer was precluded from raising any equitable defenses to Plaintiffs' claims because it had acted in "bad faith" pursuant to this Court's decision in *Albemarle*. In *Albemarle*, this Court expressly held that ameliorating equitable considerations could come into play only where the employer has acted without bad faith:

> The District Court's stated grounds for denying backpay in this case must be tested against these standards. The first ground was that

> Albermarle's breach of Title VII had not been in 'bad faith.' This is not a sufficient reason for denying backpay. *Where an employer has shown bad faith—by maintaining a practice which he knew to be illegal or of highly questionable legality—he can make no claims whatsoever on the Chancellor's conscience.* But, under Title VII, the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor. If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the 'make whole' purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.' *Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent'* for 'Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.' *To condition the awarding of backpay on a showing of 'bad faith' would be to open an enormous chasm between injunctive and backpay relief under Title VII.* There is nothing on the face of the statute or in its legislative history that justifies the creation of drastic and categorical distinctions between those two remedies.

422 U.S. at 422-23 (Emphasis added) (citations omitted).

However, the courts below failed to apply the *Albemarle* bad faith test of maintaining a practice known to be illegal or of highly questionable legality.

Instead, the district court applied a standard of "evil intent or design" (A. 63), and the circuit court one of "a specific intent to inflict injury." (A. 21). Not only are these not the standards prescribed by *Albemarle*, they are in direct and irreconcilable conflict with that decision. As quoted above, *Albemarle* expressly rejects the notion that bad faith requires "moral turpitude" which is inherent in the standards employed by the district and circuit courts below. *Albemarle* also expressly rejects the notion that the employer's "good intent or lack of discriminatory intent" negates a finding of bad faith. Thus, the bad faith standards applied by the courts below not only fail to conform to *Albemarle* but further are contrary to *Albemarle.*

As stated, under *Albemarle* an employer acts in bad faith for purposes of Title VII "by maintaining a practice which he knew to be illegal or of highly questionable legality." 422 U.S. at 422. The district court expressly found that following *Manhart* this employer "did not reasonably assume that it could continue to use the sex based tables," that it "turned a deaf ear to the *Manhart* message" and "refused to act" because it "simply did not want to make the politically unpopular decision to reduce the females' benefits." These findings were amply supported by documentary and testimonial evidence adduced at trial and clearly call for application of the *Albemarle* bad faith rule. Various FRS internal memoranda and legal opinions expressly acknowledged the need to conform to *Manhart* and the likelihood of retroactive damages for the failure to do so. It is impossible to conceive of a clearer example of *Albemarle* bad faith than is contained in the findings of the district court below. Based upon the district court's express findings, this employer knew, at the very least, that the

continued use of sex distinct tables after *Manhart* was "of highly questionable legality." This is *Albemarle* bad faith as a matter of law.

Thus, Plaintiffs respectfully submit that in failing to expressly find that the employer's bad faith precludes any equitable defenses to damages pursuant to *Albemarle*, this case is in conflict with *Albemarle*. Again, it is important to emphasize that Plaintiffs do not challenge any of the factual findings made by the district court. To the contrary, it is based upon the express factual findings of the trial court that Plaintiffs submit the district and circuit courts erred in failing to take the next step and hold that such conduct constituted bad faith as defined in *Albemarle*. Thus, not only did the courts below conflict with *Albemarle* in the standards of bad faith applied, under these express findings of fact the contrary conclusion reached below is also "clearly erroneous." *See Anderson v. City of Bessemer City, North Carolina*, ____ U.S. ____, 105 S.Ct. 1504 (1985).

III. THE OPINION BELOW DIRECTLY CONFLICTS WITH *MANHART* AND *BAZEMORE* IN DENYING DAMAGES FOR DISCRIMINATORY BENEFITS PAID AFTER *MANHART* TO CLASS MEMBERS WHO RETIRED PRIOR TO MANHART

Plaintiffs respectfully submit that in denying retroactive relief to class members who retired prior to October 1, 1978 but who were receiving retirement benefits in the years thereafter, the opinion below directly conflicts with this court's decision in *Manhart* and *Bazemore*.

There was no basis stated by the court, nor does any logical justification exist, to differentiate between pre- and post-*Manhart* retirees in this regard. The court correctly awarded both groups relief in the form of increases in future benefit payments.[7] Thus, the court necessarily and correctly found that each member of the entire class had suffered a Title VII violation. The court also found that it was appropriate to award retroactive damages back to the date of *Manhart* (as modified to allow time for implementation) as to the post-*Manhart* retirees. But, retroactive benefits should be available to all class members who were receiving underpayments of monthly benefits after *Manhart*, regardless of when they retired, and not just those who retired after October 1, 1978 (*Manhart*).

Nothing in *Manhart* says or infers that Title VII does not protect an employee from discrimination if his date of retirement occurred before the *Manhart* decision came down. Precisely the opposite, *Manhart* granted prospective relief to its claimants. Obviously, the prospective relief obtainable in 1978 must also be attainable today as retroactive relief.

From *Manhart* forward it was just as illegal to use separate "male" and "female" rates to calculate the current monthly benefits of pre- *Manhart* retirees as it was to use them in calculating the benefits of new, post-*Manhart* retirees. That practice remained just as illegal up to the date of the judgment in this case and it continues to be illegal today. Oddly, the opinion below recognizes this, in concept, by including the pre-*Manhart*

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[7]The relief granted, however, did not produce equality of benefits. See Point I herein.

retirees in the award of prospective relief from the date of judgment forward even though it denies them retroactive relief. There is nothing significant about the date of judgment herein which makes relief to this group available only from the date of judgment forward and not *Manhart* forward. To the contrary, *Manhart* is clearly the time from which to award relief to all members of the Plaintiff class.

As a result, the decision below is also in direct conflict with *Bazemore*. In *Bazemore*, the Supreme Court recognized Title VII does not permit state employers to perpetuate discriminatory employment practices which were not previously actionable. In *Bazemore* the North Carolina Extension Service discriminated against blacks with respect to salaries and promotions prior to and continuing after March 24, 1972 when Title VII became applicable to state employers. The Fourth Circuit held "the Extension Service was under no obligation to eliminate any salary disparity between blacks and whites that had its origin prior to 1972. . . ." 106 S.Ct. at 3006. The Supreme Court flatly *rejected* this conclusion, stating:

> The error of the Court of Appeals with respect to salary disparities created prior to 1972 and perpetuated thereafter is too obvious to warrant extended discussion: that the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII. To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks. *A pattern or practice that would have*

> *constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, he is liable under that statute.* While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may be imposed.
>
> *Each week's pay check that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII.* The Court of Appeals plainly erred in holding that the pre-Act discriminatory difference in salaries did not have to be eliminated.

106 S.Ct. at 3006-07 (Emphasis added). The parallels are obvious and compelling. This employer and its pension plan also had the duty to eliminate its pre-existing practices of discrimination, if not in March, 1972, then as of *Manhart*. Moreover, this duty did not extend only to persons retiring after that date but also as to persons already retired. To allow the FRS to continue to pay unequal benefits to pre-*Manhart* retirees does not eliminate discrimination, it perpetuates it.

Indeed, the Eleventh Circuit correctly did conclude that each monthly underpayment after *Manhart* constituted a separate Title VII violation for the purpose of determining which class members would receive relief under the "300 day rule." It said:

> The discriminatory event here is not the date of retirement for each employee, as the FRS contends; rather, each month's disparate retirement check constitutes a separate actionable discriminatory event and therefore a continuing violation. *See Bazemore v. Friday*, ___ U.S. ___, 106 S.Ct. 3000, 3006, 92 L.Ed.2d 315 (1986); *Perez v. Laredo Junior College*, 706 F.2d 731, 733-34 (5th Cir. 1983); *cert. denied*, 464 U.S. 1042, 104 S.Ct. 708, 79 L.Ed.2d 172 (1984). As a result every retiree who received retirement benefits within 300 days of any of the EEOC charges is correctly within the class. 805 F.2d at 1546. (A. 11).

Although the Eleventh Circuit correctly applied *Bazemore* to the 300 day rule in the context above, it failed to apply it to the issue of whether pre-*Manhart* retirees should recover retroactive damages for the discriminatory monthly payments they received *after Manhart*.

This is precisely what *Bazemore* held was illegal under Title VII. Just like each week's smaller pay check to blacks was illegal, "regardless of the fact this pattern was begun prior to the effective date of Title VII," 106 S.Ct. at 3007, each month's smaller retirement check to *all* class members violates Title VII, regardless of the fact that such payments were already being made to some retirees prior to *Manhart*. The only difference is that the 1978 *Manhart* decision is the "effective date of Title VII" for purposes of this case rather than March 24, 1972. It is wrong to suggest that North Carolina could continue to pay disparate salaries to black employees hired before the effective date of Title VII and was obligated to pay equal salaries only to persons

hired thereafter. Yet, this is the exact situation presented in this matter. The pre-*Manhart* retirees are excluded from the retroactive relief granted to post-*Manhart* retirees.

Plaintiffs submit there is no reason to exclude class members who retired between 1972 and 1978 from any recovery allowed herein as to benefits paid from 1978 to the date of judgment. They are every bit as much the victims of their employer's past discriminatory employment practices as those who retired after *Manhart*. The same reasons which compel allowing retroactive damages to class members who retired after *Manhart* also justify awarding such damages to *all* class members who retired after March 24, 1972, with respect to benefits paid after *Manhart*. After the decision in *Manhart* became known, it was and is just as illegal under Title VII to pay disparate benefits on the basis of sex as to class members who retired prior to *Manhart* as to class members who retired after *Manhart*. Thus, although there can be no recovery with respect to illegally computed benefits paid prior to the decision in *Manhart*, all class members are entitled to recover retroactive damages for disparate benefits paid after *Manhart*.

CONCLUSION

Accordingly, for all the foregoing reasons, Plaintiffs respectfully submit that the opinion of the Eleventh Circuit Court of Appeals is in direct conflict with prior decisions of this Court and the requirements of the Equal Pay Act in affirming relief at the "unisex" rate for men and at the "female" rate for women because

this fails to correct the discrimination. And, the opinion is in conflict with one prior decision of this Court in affirming the clearly erroneous conclusion by the trial court that this employer was not guilty of "bad faith" as defined by *Albemarle*. Also, the opinion below conflicts with prior decisions of this Court by denying retroactive relief to class members who retired prior to *Manhart* in 1978. Accordingly, the *Long* decision below is in direct conflict with several important decisions of this Court. Plaintiffs request that this Court grant certiorari to review the opinion below in these respects.

Respectfully submitted,

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